Texas Commission on Environmental Quality

CONFIDENTIAL AND PROTECTED ATTORNEY CLIENT COMUNICATIONS

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Thru: Guy Henry

From: Diane Goss

Date: September 21, 2006

Subject: Classification of rinsate from RCRA empty containers

QUESTION PRESENTED

1) Is a facility that removes hazardous waste heel/residue from hazardous waste containers to make the containers RCRA empty required to have a treatment, storage, and disposal (TSD) permit?

2) Is rinsate from Intra Services container washing operations exempt from hazardous waste classification?

3) Is approximately 10,000 gallons of rinsate, stored on site by Intra Services, that tests characteristically hazardous for a toxic contaminant, 1,2-Dichloroethane, classified as hazardous waste?

SHORT ANSWER

1) At a minimum the facility must comport with hazardous waste transporter rules and manifest and return the waste to the initial generator within ten days. If the facility does not manifest and return the hazardous waste to the initial generator or to initial transfer, storage, or disposal facility within ten days hazardous waste generator rules apply, and a treatment, storage, and disposal (TDS) permit may be required.

2) No. Residue no longer remaining in RCRA empty containers is not exempt from hazardous waste classification. Rinse waters combined with hazardous waste residue constitute a new waste stream. The new waste stream is subject to hazardous waste determination and may be classified as hazardous waste.

3) Yes. The rinsate stored onsite by Intra Services is characteristically hazardous and may also be hazardous under the mixture rule.

DISCUSSION

I. Background

Region 12 submitted this question asking the Environmental Law Division (ELD) 1) to classify the nature of a regulated entity, Intra Services', operations, 2) for guidance in determining whether material stored onsite by Intra Services is classified as hazardous waste, and 3) to reconcile conflicting TCEQ and EPA interpretations of rules for management of residue from hazardous waste containers.

Currently, Intra Services is registered as a transfer facility, transporter, and a small quantity generator (SQG) of hazardous waste. Intra Services accepts tank truck and roll off box containers that held characteristically hazardous waste, as well as U, K, and F listed hazardous waste. Intra Services receives non-empty hazardous containers that are not properly manifested. Intra Services has no existing agreements with the initial generators of hazardous waste it receives to determine how hazardous waste will be handled and disposed of once the waste is removed from the containers. Intra Services removes the heels/residue from containers to make the containers RCRA empty.[1] After it has removed hazardous waste from containers Intra Services then contacts the initial generators of the waste to determine how the waste should be handled and disposed of. Intra Services washes the RCRA empty containers. There is conflicting information about what materials Intra Services introduces to the new waste stream (rinsate) it generates when cleaning containers that contained hazardous waste. One source at the facility states that it uses only uncontaminated water. Another source at the facility states that it uses detergents, hydrochloric acid, diesel, and steam.

Region estimates that Intra Services has accumulated and stored approximately 10,000 gallons of rinsate from hazardous waste container washing operations in a frac tank since September 2005. The facility currently labels this frac tank as unregulated material. The hazardous waste determination of this rinsate is in dispute. Analytical sample data from March 6, 2006 indicates this rinsate is characteristically hazardous for 1,2-Dichloroethane (D028) at a value of 1.34 mg/L, above the regulatory waste limit of 0.5 mg/l. Intra Services contends that this rinsate is exempt from hazardous regulation and that it does not have to make a waste determination because, when it renders containers RCRA empty, the residue in the containers no longer meets the definition of hazardous waste.

II. Analysis

TCEQ's previous guidance is out of date and has been superseded.

Intra Services relies on a 1998 TNRCC guidance memo, "Management of Residues from Containers," for its interpretation of TAC § 335.41 and 40 CFR § 261.7. This memo states that residue removed from RCRA empty containers is exempt from regulation, and classifies waste residue generated from cleaning RCRA empty containers as nonhazardous industrial solid

[1] 40 C.F.R. § 261.7 (2005) (defining empty hazardous waste containers and exempting from classification as hazardous waste, residues that remain inside these, so called, "RCRA empty" hazardous waste containers.

waste.[2] The memo also states that residue from RCRA empty containers mixed with uncontaminated water escape characteristically hazardous waste determination, because residue that is exempt from hazardous waste regulation is not rendered hazardous by mixing with water.[3] TCEQ's interpretation contradicts EPA's more recent interpretation of the "Residues of hazardous waste in empty containers" rule.

Residue, once removed from a RCRA empty container, is no longer exempt from hazardous waste classification.

EPA clarified its interpretation of the RCRA empty container rule in a 2004 guidance memo.[4] EPA's interpretation focuses on the phrase "remaining in an empty container."[5] EPA contends that residue removed from a RCRA empty container no longer meets the exemption for "residue remaining in an RCRA empty container."[6] EPA classifies rinsate, comprised of nonexempt hazardous waste residue and solid waste rinse waters, as a new waste stream subject to full regulation under RCRA.[7]

> Even though rinse water from an "empty" container may be non-hazardous, 261.7 does not exempt rinse water because rinse water is not a waste "remaining in" an "empty" container. When residue is removed from an empty container the residue is subject to full regulation under Subtitle C if the removal or subsequent management of it generates a new hazardous waste exhibiting any characteristics identified in Part 261, Subpart C.[8]

TCEQ should adopt EPA's interpretation of rules pertaining to management of residue removed from empty containers.

Under its delegated authority from EPA, TCEQ must enact and enforce regulations that are, at a minimum, as protective of human health and the environment as those promulgated by EPA.[9] TCEQ adopted RCRA empty container provisions at TAC 335.41 using verbatim language from EPA Residues of Wastes in Empty Containers rule at 40 CFR § 261.7. State regulations that adopt EPA regulations verbatim must be interpreted at a minimum as stringently as the federal

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[2] Memorandum from Anne Rhyne, Enforcement Team II, Waste Section Enforcement Division, Texas Natural Resource Conservation Commission, to Beverly Hartstock, Deputy Director Office of Policy & Regulatory Development, Texas Natural Resource Conservation Commission on Management of Residues from Containers (August 5, 1998).

[3] *Id.*

[4] Memorandum from Robert Springer, Director of Office of Office of Solid Waste, Environmental Protection Agency, to Casey Coles, Hogan and Hartson, L.L.P. *Policy on the Management of Rinsate from Empty Containers,* April 12, 2004) *available at* <http://yosemite.epa.gov/osw%5Crcra.nsf/SearchAll?SearchView&Query=Field+TempFaxBack+contains+14708>

[5] *Id.*

[6] *Id.*

[7] *Id*

[8] *Id.*

[9] Memorandum from Mathew Hale, Director, Office of Solid Waste, Environmental Protection Agency, to RCRA Directors, Regions I-X, *Determining Equivalency of State RCRA Hazardous Waste Programs* (September 7, 2005) available at <http://www.epa.gov/epaoswer/hazwaste/state/index.htm.> RCRA State Authorization.

regulations.[10] TCEQ should adopt EPA's contemporary interpretation of 40 CFR § 261.7, and classify residues no longer remaining in RCRA empty containers as hazardous waste. In doing so, TCEQ will comply with the letter and the spirit of the law. A plain reading of the rule supports EPA's interpretation and is consistent with TCEQ's mandate to "protect human health and the environment from the potential hazards of waste disposal."[11]

Rinsate is solid waste that is subject to hazardous waste determination.

Rinsate is solid waste because it is a discarded material that does not meet any exclusion.[12] Solid waste is hazardous waste if it exhibits hazardous characteristics above regulatory thresholds and does not qualify for exclusion.[13] The EPA toxicity characteristic list includes 1,2-Dichloroethane at a level at or above 0.5 mg/l.[14] Solid waste may be hazardous under the mixture rule. The mixture rule states that waste resulting from the mixture of a solid waste with a listed hazardous waste is hazardous waste.[15] Solid waste may be hazardous under the "derived from" rule. The "derived from" rule states that solid waste generated from disposal, storage, or treatment of a listed hazardous waste becomes a listed hazardous waste.[16] Intra Services has commingled rinsate from cleaning operations of containers that held F, K, and U listed hazardous waste, with rinsate from cleaning operations of containers that held characteristically hazardous waste.[17]

Intra Services generates multiple waste streams of hazardous waste.

Intra Services meets the definition of a generator of a new waste stream of solid waste because when it removes exempt residue from a RCRA empty containers its act first causes that residue to become regulated as solid waste.[18] When Intra Services removes residue from non empty hazardous waste containers in order to render the containers RCRA empty, and does not ship the hazardous waste within ten days, it assumes the status of generator of the new hazardous waste stream and generator regulations apply.[19] The sources, types, and amounts of waste residues Intra Services cleans from containers and the cleaning agents it utilizes varies. Intra Services accumulates rinsate containing varying constituents, from a variety of containers cleaned, in batches. LQGs and SQGs must make a hazardous waste determination, label, count, handle, accumulate, and dispose of hazardous waste in accordance with regulations.[20] Intra Services must make a waste determination for each batch of waste it generates.

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[10] *Id.*
[11] 42 C.F.R. Chapter 82 § 6902(a)(4) (2005)(listing the objectives of national policy in solid waste disposal).
[12] 30 TEX. ADMIN. CODE § 335.1 (134)(A) (2004).
[13] *Id* at (62).
[14] 40 C.F.R. § 261.24(b) (2005).
[15] 40 C.F.R. § 261.3(a)(2)(iv) (2005).
[16] *Id* at (c)(2).
[17] *Id* at (b)(2).
[18] 30 TEX. ADMIN. CODE § 335.1 (58)(defining generator as one "whose act or process produces a solid waste or first causes it to become regulated").
[19] 30 TEX. ADMIN. CODE § § 335.61(d), 335.94 (2004).
[20] 30 TEX. ADMIN. CODE §§ 335.62–335.73, 335.504 (2004).

Intra Service is not a small quantity generator of hazardous waste.

Intra Services is not exempt from permit requirements because it does not meet SQG requirements. An SQG may generate greater than 100 Kg but less than 1000 Kg of hazardous waste per month.[21] When a facility generates greater than or equal to 1000 Kg of hazardous waste per month the facility does not meet the definition of an SQG.[22] Generators must accurately count hazardous waste generated by the facility each month.[23] Intra Services offers no records to demonstrate that the facility counts the quantity of hazardous waste it generates per month. Region 12 estimates the volume of hazardous waste stored on site by Intra Services to be at least 10,000 gallons. For comparison, 10,000 gallons of water weighs 37,800 Kg. Presumptively, Intra Services has generated more than the SQG regulatory allowable amount of 1000 Kg of hazardous waste per month. The amount of hazardous waste accumulated by an SQG may never exceed 6000 Kg.[24] Intra Services has exceeded the maximum SQG accumulation limits.

Intra Services is a large quantity generator of hazardous waste.

When Intra Services generates greater than or equal to 1000 Kg of hazardous waste per month or accumulates excess of 6000 Kg of hazardous waste at one time it is an LQG.[25] An LQG that accumulates hazardous waste for more than 90 days may not operate with out a TSD permit.[26]

Intra Services accumulates and stores hazardous waste in excess of TCEQ regulations.

When a generator exceeds regulatory accumulation time limits for hazardous waste, the mechanism of containment (i.e. drum, frac tank, roll-off box, sump, etc.) is deemed storage, and the facility must obtain a TSD permit.[27] Intra Services offers no records to demonstrate compliance with hazardous waste accumulation limits. Hazardous waste stored onsite by Intra Services has been accumulated for over 10 months. Presumptively, Intra Services has exceeded regulatory SQG time limit of 180 days to 270 days for accumulation of hazardous waste on site.[28] Thus, Intra Services accumulation of hazardous waste is deemed storage of hazardous waste. An SQG may accumulate a maximum of 6000 Kg of non-acute hazardous waste for a maximum of 180 days, or 270 days if the waste is shipped a distance of 200 miles or greater.[29] A large quantity generator (LQG) has a shorter accumulation limit of 90 days.[30] Intra has stored hazardous waste on site for over 240 days. Presumptively, Intra Services has exceeded regulatory time limits for on site hazardous waste storage.[31]

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[21] 30 TEX. ADMIN. CODE § 335.69(f) (2004).
[22] *Id.*
[23] 30 TEX. ADMIN. CODE § 335.9 (2004).
[24] 30 TEX. ADMIN. CODE § 335.69(f)(1) (2004).
[25] *Id* at (a), (f).
[26] *Id* at (l).
[27] *Id* at (b), (h).
[28] 30 TEX. ADMIN. CODE §335.69(h) (2004).
[29] *Id* at (f).
[30] *Id* at (a).
[31] *Id* at (b).

Intra Services' registrations do not exempt the facility from TSD permit requirements.

Intra Services contends that the facility's operations are exempt because it is a registered transporter and transfer facility. A transporter that stores hazardous waste must obtain a TSD permit.[32] When Intra Services removes residue from non empty hazardous waste containers in order to render the containers RCRA empty, manifests, and returns the hazardous waste to the original generator within ten days, these operations may be in compliance with the facility's transfer facility and transporter registrations.[33] However, when Intra Services does not return the hazardous waste to the generator within ten days, transporter status no longer applies and the facility is managing hazardous waste without a TSD permit.[34] Under present practice, Intra Services accepts non-empty hazardous waste containers that are not properly manifested. Intra Services should have a rejection policy in place to handle any containers that the facility is incapable of or unauthorized to manage.

Rinsate stored on site by Intra Services is hazardous waste.

Approximately 10,000 gallons of Rinsate stored on site by Intra Services waste is not exempt from hazardous waste determination, is characteristically hazardous for a toxicity characteristic above regulatory thresholds, and may also be hazardous under mixture rule. The exact volume of rinsate is unknown but Region 12 estimates the volume to be at least 10,000 gallons.

III. Conclusion:

Intra Services is managing hazardous waste without a permit.

Residues removed from RCRA empty containers are not excluded from the definition of hazardous waste. Rinsate consisting of residue rinsed from RCRA empty containers combined with rinsing agents constitutes a new waste stream. This new waste stream meets the definition of a hazardous waste if the rinsing agent that is a listed hazardous waste or if the rinsate is characteristically hazardous. The rinsate stored on site by Intra Services is solid waste that is characteristically hazardous. Intra Services has violated TCEQ rules because it has generated, accumulated, and stored hazardous waste in excess of regulatory limits. Intra Services' current practices subject it to the permitting requirements for owners and operators of hazardous waste storage, processing, or disposal facilities.

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[32] 30 TEX. ADMIN. CODE § 335.91(d)(2004).
[33] 30 TEX. ADMIN. CODE § 335.94 (2004).
[34] 30 TEX. ADMIN. CODE §§ 335.2, 335.94 (2004).